The misjoinder of the alternative charge, did not as it happened, involve any injustice to the appellant; and the Magistrate could, under section 167 of the Criminal Procedure Code, have convicted the appellant of theft by a servant, although he was not charged with that offence.

I alter the conviction on the substantive charge to one of theft by a servant, section 381 of the Penal Code, and maintain the sentence, which having regard to the purpose for which the appellant was employed, and the fact that he had been twice previously convicted for offences against property, cannot be regarded as excessive.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

May 17, 1940.

S. T. M. R. VEERAPPA CHETTIAR & 5 ORS.

vs.

V. R. M. L. R. M. LETCHUMANAN CHETTIAR & 5 ORS.

[PERAK CIVIL SUIT No. 178 of 1935]

Civil Procedure Code (Cap. 7), sections 212 and 213—Cross-examination upon affidavit.

Application for leave to institute a suit against a receiver.

A notice, signed by the Registrar and sealed with the seal of the Court, issued at the instance of the receiver, required the applicant to attend before the Court for the purpose of being cross-examined on his affidavit at the hearing of the application.,

The applicant failed to attend and it was contended that his affidavit could not, therefore, be read.

Held, that under sections 212 and 213 of the Civil Procedure Code an order of Court is essential before a party need attend for cross-examination.

Case referred to:—

(1) *Bottomley In re Brougham* 84 L.J.K.B. 1020.

SUMMONS.

Hum Yam Teh for plaintiffs.
S. M. Sharma for receiver.

Howes, J.—In this summons (as amended at the hearing before Murray-Aynsley, J., on the 18th March, 1940, by *Mr. Ong*, counsel for the applicant, by the withdrawal of the first portion thereof; such withdrawal being confirmed by *Mr. Teh* at the hearing before me in Court on the 1st May, 1940), the applicant V.R.M.L.R.M. Letchumanan Chettiar applies for leave to institute against Leonard James Peace as Receiver and Manager, a suit for the recovery from him as such Receiver and Manager, of the property belonging to the partnership business of "L.R.M. and L.N." (hereinafter referred to as the "old firm") the decretal amount in Suit No. 92 of 1937.

In support of the summons, the applicant filed an affidavit, sworn on the 29th February, 1940 (178). In this he seeks to show that the decretal amount of $3,520 interest and costs recovered against him and the 4th defendant, L.R.M. Muthukaruppan Chettiar, jointly as partners in the firm of L.R.M., by one Ramasamy, in Ipoh C. S. 92 of 1937, on a promissory note made by their agent, L.R.M. Subramaniam Chettiar (now deceased) in favour of Ramasamy, was in fact a debt of the "old" L.R.M. firm of which Mr. Peace is Receiver and Manager.

The applicant now applies for leave to institute a suit against the receiver to recover this amount; or (his counsel now says) to be indemnified by him against the applicant's personal liability for this debt.

At the first hearing of the summons by Murray-Aynsley, J., on the 18th March, 1940, it was adjourned into Court. The applicant took no steps to obtain a hearing date until the 10th April, 1940, when his solicitors wrote a letter (188) to the Registrar, and as the result the hearing was fixed for the 1st May, 1940. Meanwhile, on the 6th April, the applicant had sailed for India, and is still out of the jurisdiction. On the 15th April, 1940, *Mr. Sharma* solicitor for the receiver also wrote to the Registrar, asking for an early date to be fixed.

On the 24th April, 1940, *Mr. Sharma* through the Court sent a notice (195) of his intention to cross-examine the applicant on his affidavit of the 29th February, 1940. This notice, signed by the Registrar and sealed with the seal of the Court, required the applicant to attend before the Court on the 1st May, 1940, for this purpose.

In consequence of the failure of the applicant to attend, *Mr. Sharma* contended that, following the practice under Order XXXVIII, rule 28, of the English Rules, the affidavit of the applicant cannot be read. *Bottomley in re Brougham*[1].

Mr. Teh objected that although under English practice, a notice by one party requiring the other party to attend for cross-examination is all that is necessary;

under sections 212 and 213 of the Civil Procedure Code an order of the Court is essential before the other party need attend for cross-examination.

I consider *Mr. Teh's* objection is well founded; and consequently, since no order of the Court for the attendance of the applicant for cross-examination, has been obtained, the affidavit of the applicant can be read.

(The remainder of the judgment deals with the merits of the application.)

The summons is dismissed with costs.

[APPELLATE CRIMINAL JURISDICTION]

MURRAY-AYNSLEY, J.

June 10, 1940.

PUBLIC PROSECUTOR vs. LEE SEANG JOO.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 58 of 1940]

Customs Enactment (No. 5 of 1936), sections 30 and 113 (i) (a)—False declaration—No verification by signature—Person in charge.

The respondent was charged with having made a declaration under section 30 of the Customs Enactment which was false and therefore punishable under section 113 (i) (a). On appeal against his acquittal it was argued for the appellant that the words "required by this Enactment to be verified by signature only" in section 113 (i) (a) are annexed only to the words "other document" and not to the words "declaration, certificate" and that an offence could be committed without signature.

Held, the sub-section is ambiguous and the ambiguity must operate in favour of the accused.

For the respondent it was argued that he was not the "person in charge" and that only the "person in charge" could commit an offence under the section.

Held, if a person other than the "person in charge" chooses to make the declaration, an offence is committed.

CRIMINAL APPEAL.

T. V. A. Brodie, Deputy Public Prosecutor, for appellant.

J. S. Chabra, for respondent.

Murray-Aynsley, J.—This is a case under the Customs Enactment and gives rise to questions under sections 30 and 113.

It is alleged that the respondent made a declaration under section 30 and that this declaration was false, and that he thereby committed an offence under section 113 (i) (a). That part of the sub-section says "shall make or sign any declaration, certificate or other document required by this Enactment to be verified by signature only, the same being untrue or incorrect in any particular."

Now the first difficulty arises over the words "required by this Enactment to be verified by signature only." Examination of section 30 and the form settled under powers given by the Enactment do not require verification by signature and therefore if these words govern all the words used in this part of the sub-section, viz., "declaration, certificate or other document," then no offence has been committed.

The prosecution says that the words "required to be verified," etc., can only be attached to the words "other document." Difficulty is added by the use of the words "make or sign." It is clear that an offence is contemplated without signature. That might possibly mean that an offence had been committed when the person charged had made a declaration before he had verified it, if it could be contemplated that making the declaration and its verification are two separate acts. Construction of this part of the sub-section is not easy. I think that it is ambiguous and if that is so the ambiguity must operate in favour of the person charged. I think therefore that the respondent could not have been convicted under this part of the sub-section.

There was another point of law taken by the defence and it was the only one that the Magistrate dealt with. It was that the respondent was not the "person in charge," and therefore even if he made a declaration that was false he could not be prosecuted. That is I think wrong. The person in charge is the person required to make the declaration and a declaration is required to be made. If a person other than the person in charge chooses to make the declaration which is required to be made I think that an offence is committed even if the person making it is not required to make it.

Any other conclusion would obviously lead to absurd results.

There is also some difficulty on the facts as to what declaration the respondent actually made, that is did he limit his declaration to certain goods only of which he was actually in charge or did he declare the lorry-load generally and did it contain things of which he was not in charge.